

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service
Commission,

Complainant,

vs.

Union Electric Company d/b/a
Ameren Missouri,

Respondent

Case No. EC-2015-0315

**STAFF'S RESPONSE TO
AMEREN MISSOURI'S MOTION FOR SUMMARY DETERMINATION**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Response to Ameren Missouri's Motion for Summary Determination* pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

Staff's Response to Ameren Missouri's Statement of Undisputed Material Facts

1. Staff, like Ameren Missouri ("AmMo"), has moved for summary determination in this complaint case. It is Staff's position, therefore, that there are no material facts in dispute. However, that does not mean that Staff accepts all of the self-serving assertions in AmMo's *Statement of Undisputed Material Facts*.

2. Staff does not dispute the assertions set out in ¶¶ 1-26, 28, 29, 31-47, and 49-55.

3. With respect to the assertions set out in ¶ 27, Staff states that the 2011 IRP was filed in February 2011 and MEEIA Cycle 1 was filed in January 2012, eleven months later. Given the intervening changes in the marketplace, Staff found the change in avoided costs to be reasonable and therefore made no objection in the

context of the MEEIA Cycle 1 filing. This was not, and cannot be construed as, a waiver of Commission Rule 4 CSR 240-20.093(1)(F).

4. With respect to the assertions set out in ¶ 30, Staff states that AmMo has failed to correctly understand the interplay of Commission Rules 4 CSR 240-20.093(1)(F) and 4 CSR 240-20.093(2)(J). The latter binds the Commission, its Staff, and the utility to the use of a particular methodology, that is, a *formula*, throughout the life of the DSIM, while the former requires that *the most up to date avoided costs inputs* be used in the formula when calculating the annual net shared benefits (“NSB”), a portion of which will be awarded to AmMo as its performance incentive award. The Company’s interpretation would require the Commission, by the use of stale inputs, to grant a performance incentive award based on mythical avoided costs rather than actual avoided costs.¹ This issue concerns a significant disagreement arising from the implementation of the MEEIA and it is worth millions of dollars to AmMo’s ratepayers.

5. With respect to the assertions set out in ¶ 48, Staff states that the Commission’s auditor does not calculate the NSB but relies upon AmMo’s independent EM&V contractors to do this, using the avoided costs supplied by AmMo.

If There Are No Disputed Material Facts, Why Doesn’t AmMo Win?

AmMo doesn’t win because AmMo is not entitled to a favorable determination as a matter of law.² AmMo doesn’t win because AmMo is ignoring the inconvenient truth that avoided costs are not static, but dynamic for purposes of calculating

¹ Energy and capacity market conditions have changed significantly since AmMo’s Cycle 1 MEEIA Plan was approved and put in place, with the result that the value of the costs avoided by the various energy efficiency programs in AmMo’s MEEIA portfolio is much less than originally expected.

² Rule 4 CSR 240-2.117(1)(E).

AmMo's Performance Incentive Award ("PIA"). Why are they dynamic? Because Commission Rule 4 CSR 240-20.093(1)(F), which describes the operation of DSIMs, states "[t]he utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]" AmMo's "most recently adopted preferred resource plan" is the one it filed on October 1, 2014, as part of its triennial compliance IRP.³ In it, AmMo used different – and much lower – avoided cost inputs to value annual net shared benefits than it had used in its MEEIA Cycle 1 and has provided to its independent EM&V contractors to value annual net shared benefits for program year 2014.

The fact is, the energy world has changed since 2011 and 2012. Because the market price of energy and capacity has declined significantly, the costs that AmMo has avoided through its Cycle 1 MEEIA program are not as great as they were initially expected to be. That is a risk that AmMo took by participating in the MEEIA Cycle 1 programs and DSIM. In its recent *Reply Brief* in Case No. EO-2015-0055, AmMo stated:

Using updated avoided costs when making an initial decision to undertake certain programs makes sense and is exactly what Ameren Missouri proposes to do. But updating this input to the throughput calculation or performance incentive in the middle of the first MEEIA cycle creates a lottery that the utility will either win (if avoided costs go up) or lose (if avoided costs go down) based largely on factors that are completely outside the utility's control, particularly when we consider that a key driver of changes in avoided cost estimates are changes in national and international markets for gas, power and capacity. Shifting to that strategy does not reflect best practices – it cannot be the intent of the statute to reward or penalize the utility merely because avoided costs change.⁴

³ Case No. EO-2015-0084.

⁴ Pages 33-34.

Actually, the world of regulated utilities has always been characterized by exactly the sort of risk described in the excerpt above. It is therefore fully in line with the legislative intent that demand-side investments be treated like supply-side investments, because earnings from traditional utility supply-side investments have always been subject to this sort of uncertainty. When a utility builds a new plant, it cannot know in advance what the rate of return on its investment will be because the Commission will set the rate of return prospectively in the rate case in which the new plant is brought into rate base. Another example: in a *rising-cost environment*, regulatory lag benefits ratepayers; but in a *falling-cost environment*, it benefits the utility and its shareholders. Had energy prices risen, instead of falling, the use of avoided costs from AmMo's 2014 adopted preferred plan would have made its PIA *bigger than expected*. We would not be hearing this sort of argument from AmMo had that happened.

Although AmMo's Cycle 1 MEEIA Plan, as modified by the *2012 Stipulation*, provided that numerous Commission rules would be waived, it did not provide that Rule 4 CSR 240-20.093(1)(F) would be waived.⁵ Therefore, that rule governs the nature of the avoided cost information that AmMo must provide to the Evaluators for calculating its PIA. Rule 4 CSR 240-20.093(1)(F) requires that the avoided costs information from the 2014 preferred resource plan be used and not an earlier vintage. AmMo nonetheless provided avoided costs to its Evaluators based on earlier avoided costs used to value benefits for its MEEIA Cycle 1 and thereby violated

⁵ 2012 Stipulation, ¶ 23.

Rule 4 CSR 240-20.093(1)(F).⁶ For that reason, AmMo is not entitled to a favorable determination as a matter of law and does not win.

For all the complexity of the MEEIA rules, AmMo's MEEIA Cycle 1 Plan and the *2012 Stipulation*, this is not a difficult case. AmMo violated a Commission rule, as Staff has charged, and does not deny that it did so. Staff is therefore entitled to summary determination and AmMo is not.

AmMo's Flawed Arguments:

Staff will discuss each of AmMo's arguments in turn and show why it fails. AmMo assures the Commission that "Staff's argument reflects a position directly at odds with the Modified MEEIA 1 Plan, with the terms of the Commission's regulations and with logic and common sense."⁷ Of course, this quote equally well reflects Staff's view of AmMo's position.

First, AmMo argues that the approved Cycle 1 MEEIA Plan and DSIM, as defined by AmMo's *Report* and the *2012 Stipulation*, expressly provides that avoided costs shall not be updated.⁸ This conclusion is based upon a table in AmMo's *Report* in which a bright red "X" appears in a column headed "Update?" in the row labelled "Avoided Costs."⁹ An explanatory notes states, "[t]he avoided energy, capacity, and T&D values are deemed[.]"¹⁰ AmMo summarizes by saying, "Avoided costs are an item

⁶ *Staff's Complaint*, ¶¶ 11 and 12; admitted by AmMo in its *Answer*, ¶¶ 13 and 14.

⁷ *Ameren Missouri's Memorandum of Law in Support of its Motion for Summary Determination* ("AmMo's Memo"), p. 4.

⁸ *AmMo's Memo*, pp. 4-6.

⁹ Table 2.12, reproduced at pp. 5-6 of *AmMo's Memo*.

¹⁰ *Id.*

that is not to be updated – period.”¹¹ AmMo goes on to assert that “[t]he only way, therefore, that avoided costs could be updated and also comply with the Stipulation and the Commission’s Order approving it would be if the Stipulation modified the performance incentive in the DSIM. It did not.”¹² However, AmMo’s argument ignores that pesky regulation, 4 CSR 240-20.093(1)(F), and its binding admonition that “[t]he utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]” AmMo’s argument also ignores the contrast in the *2012 Stipulation* between the calculation of the lost revenues portion of the DSIM,¹³ for which avoided costs are not subject to update, and the calculation of the PIA, where they are.¹⁴

AmMo next argues that Rule 4 CSR 240-20.093(1)(F) does not actually mean what it plainly says. AmMo explains:

What the sentence relied upon by the Staff means is that when avoided costs must be calculated in relation to the submission of a MEEIA plan, the same method, the same procedure or set of procedures, must be used as was used for calculating avoided costs used in the IRP which led to the preferred plan. In other words, the utility cannot use one process for calculating avoided costs for the IRP and then use a different process for calculating them for MEEIA. Here, the Company used the same process in both its most recent IRP underlying its most recent preferred plan (i.e., as of the time the MEEIA 1 Plan was prepared – its 2011 IRP and the preferred plan reflected therein) as it used when it later determined the avoided costs for its MEEIA 1 Plan. The Company did *not*, however, use the same avoided cost *inputs* for its 2011 IRP as the avoided costs inputs it used for its MEEIA 1 Plan *because that is not what the MEEIA rule provides for*. The same methodology was used, to be sure, but the same inputs (i.e., the same values for drivers of avoided costs – the dollars and

¹¹ *AmMo’s Memo*, p. 6.

¹² *Id.*

¹³ Which, under the *2012 Stipulation*, was replaced by a share of the Net Shared Benefits (NSB) referred to as the “TD-NSB Share.” See *2012 Stipulation*, ¶ 5.b.i.

¹⁴ See below, pp. 9-12.

cents of energy prices, capacity prices, and avoided T& D costs) were not used.¹⁵

In AmMo's view – based on that big red “X” in Table 2.12 of its *Report* -- avoided costs are fixed and cannot change because the focus is on “the cost of the programs and the number of measures implemented.”¹⁶ If true, this would indeed be odd for a performance award because it would divorce the award from the actual performance – that is, the cost savings or benefits, if any, achieved by the demand-side programs. But it is not true. The Performance Incentive Award (PIA) is a percentage of the Net Shared Benefits (NSB), that is, the money saved through energy efficiency.¹⁷ Avoided costs are a crucial factor used in calculating the NSB.¹⁸ The more costs that are avoided, the more money the PIA will necessarily be worth – and *vice versa*. For that reason, it is absurd and contrary to logic and common sense to take the position that avoided costs are not updated to reflect changing market conditions when determining the PIA. That is the only way that the real world financial impact of energy efficiency programs can be determined.

In addition to being absurd, AmMo's position is unlawful. Section 393.130.1, RSMo., provides:

All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be

¹⁵ *AmMo's Memo*, pp. 8-9. (Emphasis in original; footnotes omitted.)

¹⁶ *AmMo's Memo*, p. 6 and Subsection 2.6 of *AmMo's Report*.

¹⁷ ¶ 5.b.ii of the *2012 Stipulation* states: “After the conclusion of the three-year Plan period . . . Ameren Missouri will be allowed to recover the performance incentive, which is a percentage of NSB[.]”

¹⁸ Rule 4 CSR 240-20.093(1)(B): “Annual net shared benefits means the utility's avoided costs measured and documented through evaluation, measurement, and verification (EM&V) reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies, and technical resource manual on an annual basis[.]”

just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

Nothing in the MEEIA, § 393.1075, RSMo., exempts MEEIA programs from § 393.130.1, RSMo. It is difficult to imagine a more “unjust and unreasonable charge” than a PIA award based on deemed avoided costs that do not reflect reality.

AmMo also relies on Rule 4 CSR 240-20.093(2)(J), which provides:

If the commission approves [a] utility incentive component of a DSIM, such utility incentive component shall be binding on the commission for the entire term of the DSIM, and such DSIM shall be binding on the electric utility for the entire term of the DSIM, unless otherwise ordered or conditioned by the commission when approved.

Nothing in Staff’s position is contrary to Rule 4 CSR 240-20.093(2)(J). The application of Rule 4 CSR 240-20.093(1)(F), as the law requires, does not disturb the utility incentive component of the DSIM. It will function exactly as contemplated by both AmMo’s plan and the *2012 Stipulation*. Presumably, AmMo and all of the other signatories were fully aware of Rule 4 CSR 240-20.093(1)(F) and realized that, if not waived, it would require that avoided costs be updated *if AmMo changed its IRP methodology*. AmMo did change its IRP methodology and Rule 4 CSR 240-20.093(1)(F) therefore requires that avoided costs be updated. If this is not the outcome that AmMo anticipated, then it should have sought and obtained a waiver of the rule, as it did for several other rules.

AmMo goes on to argue that a methodology, as referred to by Rule 4 CSR 240-20.093(1)(F), is a formula and not the inputs used in that formula.¹⁹

¹⁹ *AmMo’s Memo*, pp. 8-11.

Under this view, AmMo has complied with the rule because it calculated avoided costs the same way in both its 2011 IRP and its 2014 IRP.²⁰ The inputs it used, however, were different.²¹ This argument is also absurd because it renders Rule 4 CSR 240-20.093(1)(F) pointless. The word “methodology” as used in the rule necessarily encompasses the formula, the inputs, and the results of the calculation. What Rule 4 CSR 240-20.093(1)(F) requires is that the avoided costs from AmMo’s most recently adopted preferred resource plan be used in calculating NSB for the purposes of the PIA.

AmMo asserts:

[T]he Commission approved the utility incentive component of the DSIM when it approved the DSIM itself. The Commission, and the utility, are bound by it, and what they are bound to is the methodology, because the utility incentive component is a methodology; it is not a dollar figure. To turn avoided costs, which is a fixed component of the methodology, into a variable component, is to change the methodology itself and since the utility incentive component is a methodology, turning avoided costs into a variable component is a change to the utility incentive component itself. The rules (not to mention the MEEIA 1 Plan) prohibit such a result.

Again, AmMo ignores Rule 4 CSR 240-20.093(1)(F), which *requires* that the avoided costs be updated *if and only if* AmMo updates the methodology of its IRP. AmMo could have asked for a waiver of this rule, but did not. Nor should it have been waived because, as previously discussed, the result would be that the ratepayers would have to reward AmMo for cost savings that never occurred and, thus, never produced benefits for ratepayers. As a matter of fact, that’s exactly what AmMo is asking for.

²⁰ *Id.*, pp. 9-10.

²¹ *Id.*, p. 9: “The Company did not, however, use the same avoided cost inputs for its 2011 IRP as the avoided costs inputs it used for its MEEIA 1 Plan[.]” (Emphasis and footnotes omitted.)

AmMo's final argument is that Staff's position turns the PIA into an "energy cost lottery" that the Company has no control over.²² First, let's put the PIA in perspective. AmMo's DSIM includes \$49.1 million in each of three years for program costs.²³ That's \$147.3 million over the three year life of the Plan. It also includes \$30.45 million in each of three years as consolation to AmMo for the "throughput disincentive"; that is, the revenue it won't earn for the service it won't sell.²⁴ That's \$91.35 million over three years. And, the throughput disincentive²⁵ is subject to true-up and the amount AmMo collects may actually be more.²⁶ Note that, in truing-up the throughput disincentive:

the only changes that will be made to the inputs into the DSMore model that was utilized for the MEEIA Report when the DSMore model is re-run (at any point in time) to calculate actual NSB are (i) the actual number of energy efficiency measures (by type) installed in each month up to that point, (ii) the actual program costs in each month incurred up to that point; and (iii) for Commercial and Industrial Custom measures for which the TRM does not provide a deemed value, savings determined according to the protocol provided for at pages 85 to 98 of the TRM. EM&V shall not be utilized to calculate the actual NSB for the purposes of determining Ameren Missouri's TD-NSB Share.²⁷

Unlike the calculation of the NSB for purposes of determining the PIA, the *2012 Stipulation* expressly provides that the inputs *are not adjusted when calculating the TD-NSB*. The contrast with the PIA calculation at ¶ 5.b.ii. could not be more clear.

²² *AmMo's Memo*, pp. 11-15, esp. p. 14.

²³ *2012 Stipulation*, ¶ 5.a.

²⁴ *Id.*, ¶ 5.b.i.

²⁵ Also called the "TD-NSB Share."

²⁶ *Id.*, ¶ 6.b: "\$30.45 million is 90% of the estimate of Ameren Missouri's TD-NSB Share, and the amount actually billed will almost certainly vary from the \$30.45 million to be reflected in Ameren Missouri's revenue requirement in Case No. ER-2012-0166. The Signatories agree there is a need to true-up (separately for the residential and non-residential customer classes) the 90% of the estimated Ameren Missouri TD-NSB Share that is billed to the amount of the Ameren Missouri TD-NSB Share."

²⁷ *Id.*

Finally, the PIA. This is a percentage of NSB based on AmMo's percentage performance score in meeting the Plan's targets.²⁸ At 100% of Plan targets, AmMo will receive 5.03% of NSB which, for planning purposes, is estimated to equate to \$18.75 million, received over two years following the end of the MEEIA Cycle 1 Plan.²⁹ Note that \$18.75 million is only about 7 percent of the total amount to be collected by AmMo under its MEEIA Cycle 1 Plan.

Back to the "energy cost lottery." There are several considerations that make it clear that the PIA, unlike program costs and the TD-NSB Share, was intended to be based upon the MEEIA Cycle 1 Plan's actual achievement. First, ¶ 5.b.ii. explains that EM&V will be used after each program year to determine the actual net energy savings.³⁰ The PIA is based on the three-year cumulative total net energy savings.³¹ This figure is multiplied by avoided costs to determine the NSB. Second, the PIA is calculated and paid *only after the MEEIA Cycle 1 Plan is completed*. Clearly, this is because the PIA is based on actual achieved results, which can be known only after the plan is done and as a result of full EM&V. Third, the PIA is a percentage of the NSB; it is not an arbitrary award figure unrelated to actual performance such as AmMo

²⁸ *Id.*, ¶ 5.b.ii. and Appendix B to the 2012 Stipulation.

²⁹ *Id.*, ¶ 6.c.i. and Appendix B.

³⁰ *Id.*, ¶ 5.b.ii. "After the conclusion of the three-year Plan period, using final Evaluation, Measurement and Verification ("EM&V") results (with EM&V to be performed after each of the program years 1, 2 and 3), Ameren Missouri will be allowed to recover the performance incentive, which is a percentage of NSB as described on Appendix B attached hereto and incorporated herein by this reference (the "Performance Incentive Award")."

³¹ *Id.* "The cumulative net megawatt-hours ("MWh") determined through EM&V to have been saved as a result of the MEEIA Programs will be used to determine the amount of Ameren Missouri's Performance Incentive Award, with the cumulative net MWh performance achievement level (expressed as a percentage) being equal to cumulative net MWh savings determined through EM&V divided by Ameren Missouri's total targeted 793,100 MWh (which is the cumulative annual net MWh savings in the third year of the three-year Plan period)."

originally proposed.³² It is reasonable and just that the size of the PIA should vary with the amount of the actual NSB generated by AmMo's MEEIA Cycle 1 Plan. Finally, § 393.1075.3, RSMo., requires that demand-side investments be treated like traditional supply-side investments. The return earned on the latter changes, as AmMo well knows, with each general rate case when the Commission resets the rate of return on rate base. It follows that the return realized on demand-side investments should reflect changes in the energy market.

Conclusion:

The reality is that life *is* a lottery. We all win sometimes and lose others. This principle is just as true when applied to utilities. Changing market conditions, weather, politics, and many other dynamic factors affect the profitability of utility operations. It is not by any means contrary to logic or common sense to apply this principle to the PIA and that, in fact, is exactly what Rule 4 CSR 240-20.093(1)(F) accomplishes.

WHEREFORE, having fully responded to AmMo's *Cross Motion for Summary Determination*, Staff prays that the Commission will determine that AmMo has violated a statute and Commission rule and Commission orders as alleged by Staff; direct AmMo to provide the appropriate avoided costs to its Evaluators, and authorize its General Counsel to seek appropriate penalties for those violations in Circuit Court; and grant such other and further relief as is just in the circumstances.

³² *AmMo's Report*, § 2.5: "Ameren Missouri estimates that a long-term annual incentive of \$10 million would provide a present value of earnings equal to that of constructing a combined cycle plant in 2029."

Respectfully submitted,

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Affidavit

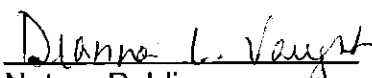
COMES NOW John Rogers, being of lawful age and sound mind, and upon my oath declare that I am Manager of the Energy Resource Analysis Section of the Staff of the Missouri Public Service Commission; that by virtue of education and experience I am knowledgeable of the regulated electric industry in Missouri, including the operations of Ameren Missouri; that I participated in the drafting of the PSC's MEEIA rules and in the proceedings concerning Ameren Missouri's Cycle 1 MEEIA Plan; and that I have read the foregoing *Staff's Response to Ameren Missouri's Cross Motion for Summary Determination* and, to the best of my knowledge and belief, the facts and opinions stated therein are true. Further the Affiant sayeth not.


John Rogers

Jurat

SUBSCRIBED AND SWORN before me, A Notary Public commissioned in and for the County of Cole, State of Missouri, at my office in Jefferson City, Missouri, on this **16th day of September, 2015.**

DIANNA L. VAUGHT
Notary Public - Notary Seal
State of Missouri
Commissioned for Cole County
My Commission Expires: June 28, 2019
Commission Number: 15207377


Notary Public

My commission expires: June 28, 2019

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **16th day of September, 2015**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

/s/ Kevin A. Thompson